NATIONAL RETAIL FEDERATION

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May 26, 1992

Mrs. Donna R. Searcy
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: The Telephone Consumer Protection Act of 1991
CC Docket 92-90

Dear Mrs. Searcy:

Enclosed are an original and nine copies of the National Retail Federation's comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned matter.

Sincerely,

Michael J. Altier
Vice President,
General Counsel

Enclosures

RETAIL SERVICES DIVISION • 100 WEST 31ST STREET, NEW YORK, NY 10001 • (212) 244-8780

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
THE TELEPHONE CONSUMER PROTECTION ACT OF 1991	)	CC Docket No. 92-90
	)	

COMMENTS OF NATIONAL RETAIL FEDERATION

The National Retail Federation ("NRF") submits these comments in response to the Commission's Notice of Proposed Rulemaking with respect to implementation of the Telephone Consumer Protection Act of 1991 ("TCPA").

By way of background, the National Retail Federation is the nation's largest trade group which speaks for the retail industry. The organization represents the entire spectrum of retailing, including the nation's leading department, chain, discount, specialty and independent stores, several dozen national retail associations and all 50 state retail associations. The Federation's membership represents an industry that encompasses over one million U.S. retail establishments, employs nearly 20 million people and registered sales in excess of $1.8 trillion in 1991.

It is increasingly the practice of retail merchants to make use of the telephone in a variety of business and commercial applications. Retailers use the telephone for marketing purposes -- e.g., to inform "preferred customers" of sales or special offers available at the retail outlet -- and, in some cases, for direct-to-consumer sale. The telephone is also used for customer service,

to inform consumers that a product they have ordered is now in stock and available for pick up or purchase. The telephone is also used for debt collection purposes. Accordingly, the TCPA has implications for ways in which NRF members conduct business and relate to their present and prospective customers.

Unfortunately, the TCPA is an extremely complicated and, in many respects, a highly problematic piece of legislation. However, the statute provides the Commission with the authority to implement its basic purposes without unduly impeding legitimate business practices and without burdening the economy. It is NRF's fundamental position that the Commission should impose regulations under the TCPA only where it is clearly required to do so and should, in those areas, afford the greatest flexibility possible.[1/] In these comments, NRF briefly addresses three issues that particularly require that the Commission adhere to this basic approach:

1/ For example, the TCPA defines the term automatic telephone dialing to mean equipment which "has the capacity" to store or produce numbers to be called on a random or sequential basis. Not all equipment used for automatic dialing falls within this definition: dialing equipment can be, and often is, configured so that it does not have the capacity to place random or sequential calls. Therefore, the Commission should make clear that calls made by means of equipment configured so that it lacks "the capacity" to be used for random or sequential dialing are exempt from the TCPA.

THE COMMISSION SHOULD DEFINE THE TERM "PRIOR EXPRESS CONSENT" TO INCLUDE ALL SITUATIONS IN WHICH THE CALLER HAS VOLUNTARILY SUPPLIED A TELEPHONE NUMBER OR HAS AN ESTABLISHED BUSINESS RELATIONSHIP WITH A MERCHANT.

As the Commission has correctly observed, there are a variety of means by which a consumer may give "prior express consent" to calls that would otherwise be subject to Section 227(b)(2)(B). Although it is implicit in the Commission's proposed rule, the Commission's decision should make very clear that one of those means includes any situation in which the customer decides to voluntarily provide a marketer with a telephone number at which he or she can be contacted. There are situations in which a customer may want to be contacted at a health care facility or on his or her car phone, or at some other telephone number that is not his own. Moreover, with the imminent deployment of "700 service" -- which will enable telephone subscribers to be reached wherever they may be throughout the country -- it may, over time, be impossible for a merchant to call its customers only when they are at a specific location. Certainly, if the consumer volunteers a number at which he or she may be called, merchants should not be penalized for placing the call to that number.

We also believe that the Commission is correct in reaching its tentative conclusion that there is "prior express consent" whenever an "established business relationship" between merchant and consumer exists. However, we see no reason -- for purposes of the provisions of the TCPA dealing with automatic pre-recorded messages

and those dealing with unwanted telephone solicitations -- for the Commission to undertake to provide a regulatory definition of the latter term. The fact is that there is and can be no fixed prescribed understanding of the term "established business relationship."

The term cannot be defined as a function of the number of contacts between a potential seller and buyer. When a relationship is ongoing and requires the disclosure of detailed personal information such as for the continuing provision of credit or in certain insurance transactions, one or two contacts may suffice. In that case, because of the nature of the contact, the merchant has a reasonable expectation that an established relationship exists, even though there may have been no direct contact in some period of time. In other contexts, because of a series of transactions that have occurred over an extended period of time, a relationship may have developed. The merchant may offer its customer "preferred shopper status"; and the customer acceptance of the benefits of that status may signify an expectation on the part of the merchant that a relationship exists. Similarly, it is not unreasonable for a merchant to conclude that consumers with whom he has had prior dealings are interested in offers of new, complementary or supplementary goods and services. The mere fact that a telephone solicitation call (whether live or pre-recorded) involves cross-selling does not, in the realities of the modern

marketplace, automatically take it outside the bounds of an established business relationship.

It is impossible to adopt a rule which encompasses all of the possible variables that define what is inherently a subjective condition. Accordingly, we submit that, to the extent the Commission finds it necessary to address the meaning of the term "established business relationship" at all, it should do no more than establish the general principle that where a seller has reasonable grounds to believe that it (or its affiliates in a family of companies) would be perceived as having such a relationship with the called party such a relationship exists. It should affirm that when the called party has voluntarily provided the telephone number at which he or she wishes to be called, both prior "express consent" and an established relationship exist.

ALL DEBT COLLECTION CALLS SHOULD BE CATEGORICALLY EXEMPTED FROM THE TCPA.

NRF submits that proposed Section 64.1100 and any regulations the Commission may adopt with respect to implementation of the part of the TCPA dealing with unwanted telephone solicitation should contain an affirmative and categorical exemption for debt collection calls. As the Commission has pointed out in the Notice of Proposed Rulemaking (NPRM at ¶¶14-16), to the extent that debt collection calls comply with applicable state or federal debt collection laws, they do not involve the use of the telephone for marketing or servicing. However, the Commission's proposal to classify such calls as exempt because they do not contain an

"unsolicited advertisement" or because they involve calls to a consumer with whom the merchant has an "established business relationship", does not fully resolve this issue.

From the standpoint of the American economy, the use of automatic dialing equipment in debt collection is of benefit. This specialized equipment greatly increases the efficiency of the collector and thereby reduces the cost of collection, alleviating unnecessary burdens upon the American economy and the American public. Such calls also serve consumer interests because, in many cases, a consumer can preserve his or her credit rating if an obligated payment is made within a short time after receiving the collection call.

The problem arises, however, because proposed rule 64.1100(d) requires that all artificial pre-recorded telephone messages (presumably including debt collection calls) state, at the beginning of the message, the identity of the business, individual, or other entity initiating the call. In the case of calls made using sophisticated dialers, the delivery of a complete preamble may not always be possible. In some instances, all operators may be busy and a brief pre-recorded message may be delivered; because the equipment is programmed to connect a called party to the live operator as soon as possible, a pre-recorded message may be interrupted, before completion, when the live operator comes on the line. Thus, the literal requirements of the Commission's proposed rule could be satisfied by either (i) holding the consumer on the

recording for an additional period of time to be sure that he or she hears the name of the caller or (ii) by requiring the operator to repeat information that the customer may have already received. Either result is illogical, costly, and unnecessary with respect to the purposes of the TCPA.

There is a simple, yet fair and rational solution to this problem. As a matter of common sense, the TCPA did not intend to encompass debt collection calls. Although commercial in nature, such calls do not contain an unsolicited advertisement and are carefully targeted toward those telephone numbers at which the potential debtor can be reached. To the extent that such calls may affect consumers' privacy interest, federal and state debt collection practices provide all of the protection that is necessary. In these circumstances, there is simply no reason for a double layer of regulation, particularly one which creates the potential for conflict between this Commission's requirements and those of the Federal Trade Commission.

Under Section 227(b)(2)(B), the Commission is given the authority to create exemptions for commercial calls that do not adversely affect the "privacy rights" of consumers and do not contain an unsolicited advertisement. Although the provisions of Section 227(d) do not contain an express delegation of authority to create a parallel exemption from the notice requirements imposed by that subsection, neither the Act nor its legislative history requires that debt collection calls that are partially (and only

occasionally) pre-recorded be made subject to Section 227(d)(3). The Commission thus has the power to categorically exempt all debt collection calls from the requirements of the TCPA. It should do so.

THE COMMISSION SHOULD DO NO MORE THAN REQUIRE COMPANY-SPECIFIC, DO-NOT-CALL LISTS WITH RESPECT TO LIVE OPERATOR CALLS.

A review of the legislative history of the TCPA makes plain that it was principally addressed at the use of automatic pre-recorded message calls made for the purpose of promoting the sale of goods or services. That problem is squarely resolved by the Commission's proposed regulations. There is, however, little, if any, justification for regulation of telephone solicitation calls involving live operators. As the NPRM itself points out, there have been extremely few complaints with respect to such calls. This conclusion is borne out by the hands-on experience of major merchants who voluntarily maintain in-house, company-specific, do-not-call programs. Some studies report that fewer than one called party in 100,000 requests that his or her name be removed from the calling list.

Any system of regulation in this area will impose both industrial and societal costs. The Commission should, therefore, consider whether the regulation of live operator marketing calls is necessary at all. Should the Commission determine that such a new regulatory mechanism is necessary or required by the TCPA, it must, at the very least, select the method that is least intrusive

upon legitimate business practices and causes the least possible harm to the economy.

At most, then, the Commission should undertake to regulate live operator calls based upon, and only upon, a requirement that companies engaged in making such calls maintain company-specific, in-house, do-not-call programs. Although certainly not without cost to merchants, this approach at least affords the maximum measure of flexibility and therefore the least cost. Many reputable merchants already have in place a means of suppressing calls to customers who have indicated that they do not wish to be contacted. Company-specific, do-not-call systems also serve the interest of consumers because they do not force the consumer to make the unfair, non-economic choice of either accepting all live operator telephone solicitation calls or none.

None of the regulatory alternatives before the Commission satisfies the tests of protecting the consumer without impairment of legitimate business practices and burden upon the economy. Any regulatory system based upon national or regional do-not-call databases would entail massive costs even to the largest retail companies. Large retail companies often have hundreds, and sometimes even thousands, of outlets throughout the country. Telephone solicitation programs may be run by these local outlets at different times and for very different purposes. In order to satisfy the requirements of a national or regional database regulatory program, these companies would either have to set up

complex and sophisticated communications systems to assure that all outlets have the most current do-not-call database at all times or require each outlet to separately match its calling list against the national or regional database before any telephone marketing campaign is undertaken. Either approach would entail staggering costs. Smaller merchants with few or even only one retail outlet would also face prohibitive costs because they would be required to obtain specialized equipment and provide their personnel with specialized training to administer the national database program. Accordingly, for economic reasons alone, any system of regulation based upon third-party compilation of databases must be rejected.

For similar reasons, the Commission should narrowly tailor its rules (if any) mandating company-specific, do-not-call programs. The rules should make plain that these policies may be applied company-wide or on an affiliate, division or licensee-specific basis. Special provisions also should be made for small local businesses and for local outlets of larger companies. Consistent with Section 227(c)(1)(C) of the Act, the Commission should give serious consideration to establishing an exemption for telephone solicitations placed within a local marketing area. Although these local outlets may be legally affiliated with a large corporation or a large corporate chain, the facility itself represents a "local business" in the true sense of that word and, in many cases, may have as few as two or three employees. The calling lists of these outlets are also highly localized. To require these local retail

outlets to match their lists against the lists of other stores or businesses, merely because they are owned by the same company, is both unreasonable and unnecessary to the purposes of the TCPA. Therefore, the Commission should exempt as "small businesses" all calling activity conducted within a local marketing area. At the very least, this activity should not be subjected to the same recordkeeping and verification requirements as may be required of marketers conducting unified, national campaigns.

Lastly, the Commission's regulations should be structured so that good-faith compliance with the purposes of the TCPA fully protects the merchant. It should provide that adherence to company-specific, do-not-call requirements or some alternative system -- subscription to industry-wide, self-regulation, do-not-call lists -- is, as a matter of law, prima facia evidence that the marketer is in compliance with the Commission's rule. As a part of this, the Commission should make clear that innocent and inadvertent failures to satisfy the literal terms of the TCPA are not actionable.

NRF and its members recognize that consumers have a right to be protected from calls to which they object. That right must be balanced, however, against the benefits of easy and convenient marketing by telephone. If there is any need for regulation, only systems which allow national marketers to flexibly adopt in-house, do-not-call systems, which provide an exemption (or at the least more relaxed requirements) for local calling and which adequately

protect merchants and their agents from baseless litigation permits the complex and internally inconsistent terms of the TCPA to be implemented in a fashion which is fair to legitimate merchants and consumers alike.

Respectfully submitted,

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